FILE COPY

Office - Supreme Court, U.S.
FILED
MAY 27 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1954

CHARLES GUSICK, Petitioner, vs. **ARIZONA,** Respondent.	}	PETITION FOR CERTIORARI No. 681

PETITION FOR REHEARING

FRANCIS J. BROWN,
Title & Trust Bldg.,
Phoenix, Arizona,
WM. SCOTT STEWART,
Chicago Temple,
Chicago 2, Illinois,
Attorneys for Petitioner.

BARNARD & MILLER, 33 S. Wacker Drive, Chicago 6. FRanklin 2-0562

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1954

CHARLES GUSICK, Petitioner, vs. **ARIZONA,** Respondent.	}	**PETITION FOR CERTIORARI No. 681**

PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Your Honors denied certiorari on May 9, 1955. We have studied Rule 58 and trust that we have properly limited this petition to substantial grounds available to petitioner although not previously presented. The case of *Smith* v. *O'Grady*, 312 U.S. 329 was not called to the attention of this Honorable Court. In many ways it appears to be on all fours with the case at bar. We now follow the language of *Smith* and make it apply to Gusick in the hope that Your Honors will reconsider.

The question presented is whether petitioner's application for writ of habeas corpus filed in an Arizona state court alleged facts which if proven entitled him to release

from prison because he was held pursuant to a court judgment rendered in violation of rights guaranteed him by the federal Constitution. The Supreme Court of Arizona held that the petition failed to state a cause of action justifying the relief prayed. Without requiring the State to answer and without giving petitioner an opportunity to prove his allegations the application was ordered dismissed by the Supreme Court.[1]

The judgment of the Arizona Supreme Court is a final and authoritative answer to petitioner's contention that his imprisonment is illegal under the state's constitution or laws. But petitioner also contended that his imprisonment was illegal under the federal Constitution. And in denying the benefit of the writ the Arizona court necessarily held that petitioner's allegations—even if proved in their entirety—would not entitle him to habeas corpus, even if the petition showed a deprivation of federally protected rights. To review this question Your Honors should, we respectfully submit, grant certiorari.

In *Smith* relief through the Parole Board was suggested. In Gusick no relief appears available. Your Honors cannot lightly assume that Arizona affords no corrective process for one who is imprisoned under a judgment rendered in violation of rights protected by the federal Constitution. That Constitution is the supreme law of the land, and

> "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution."[2]

---

[1] After the local trial court had held the petition to be sufficient and had ordered a hearing. Under State Code habeas corpus 44-3303 trial court and Supreme Court have concurrent jurisdiction.

[2] *Mooney* v. *Holohan*, 294 U.S. 103, 113.

The Arizona Supreme Court has held in many other cases that the writ was properly invoked to obtain release from imprisonment resulting from deprivation of constitutional rights. Because of this, and because a contrary conclusion would apparently mean that Arizona provides no judicial remedy whatsoever for petitioner, even though he can show he is imprisoned in violation of procedural safeguards commanded by the federal Constitution, Your Honors should be unable to reach the conclusion that habeas corpus is unavailable under Arizona law.

It is therefore the duty of this Honorable Court to examine petitioner's allegations in order to determine whether they show that his imprisonment is the result of a deprivation of rights guaranteed by the federal Constitution.[3]

Mr. Justice Black, speaking for this Honorable Court, reviews the specific allegations made by Smith in his petition for the writ of habeas corpus. The allegations made by Gusick are different, but that said by Mr. Justice Black, we respectfully submit, is applicable. These allegations, if true, undermine and invalidate the judgment upon which petitioner's imprisonment rests. If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment. The state Supreme Court erroneously decided that the petition stated no cause of action. If petitioner can prove his allegations the judgment upon which his imprisonment

[3] In the absence of any opinion or announcement by Your Honors, we have concluded that for some undisclosed reason Your Honors up to now have never reached the question of the sufficiency of the habeas corpus petition. It is true that the State Supreme Court specifically held it to be insufficient. Such decision must have included our federal questions.

rests was rendered in violation of due process and cannot stand.[4]

We have now finished with following the language of *Smith*.[5]

In view of the fact that we did not reply to the brief filed here by Messrs. Morrison and Langmade in opposition and therefore it may be possible that Your Honors inadvertently misapprehended the real question, we respectfully copy the three propositions of law urged by the Arizona Attorney General, and follow each with our reply.

I.

Petitioner Gusick, was afforded notice, hearing, representation by counsel, and all things commensurate with due process by the State of Arizona.

From the argument, p. 4, made by the Attorney General, Your Honors will perceive that this applies to proceedings in the Arizona Supreme Court. The more important question was whether or not Gusick was afforded due process in the court of conviction and again before Judge Thomas, the judge who issued the writ.

II.

Jurisdiction of the Arizona Supreme Court was invoked for the purpose of decision on a point of Arizona State law.

Here the Attorney General overlooked our claim that substantial federal questions were first decided in favor of Gusick by Judge Thomas and later nullified by the Arizona Supreme Court. After Your Honors reconsider this case in the light of *Smith*, Your Honors must conclude, we respectfully submit, that the adverse decision given by the Arizona Supreme Court does not rest upon non-federal ground as here asserted in this 2nd Proposition.

---

[4] See *Truax* v. *Corrigan*, 257 U.S. 312, 324. Your Honors are at full liberty to consider facts admitted by demurrer as was the Supreme Court of Arizona. See footnote 4, 340 U.S. 322.

[5] It appears that subsequently Smith was unable to prove the allegations made in his petition. *Smith* v. *Olson*, 44 F. Supp. 456.

III.

The jurisdiction of the Arizona Supreme Court is founded both upon its constitutional and its inherent power of superintendency over the inferior courts of the State of Arizona.

There can be no question but what the Arizona Supreme Court has certain inherent power, but the Attorney General, we respectfully submit, has misapprehended our point here made clear, we hope, by *Smith*. Judge Thomas acted in the capacity of a federal judge and the Arizona Supreme Court should be bound to recognize the Fourteenth Amendment. If we abandon our effort to distinguish the cases wherein the Arizona Supreme Court properly took petitions for the writ of habeas corpus from the trial courts and now assume that Your Honors are not concerned with State practice, we come right back to *Smith*. If this decision of the Arizona Supreme Court be permitted to stand, Gusick has no remedy under state law, even assuming that he is able to prove his petition and in fact the Fourteenth Amendment has been violated. We trust that after Your Honors again read *Smith*, a rehearing will be granted and certiorari allowed.

When Your Honors denied our petition for certiorari, on May 9 last, no reasons were given as far as we have been advised. Mr. Justice Frankfurter said, dissenting in *Jennings* v. *Illinois*, 342 U.S. 104, 112, that reasonable legal ground must be attributed to the dispositions made by Your Honors without opinion. But unfortunately this leaves us in the dark as so many grounds are possible in this unusual case. Also Your Honors said in *Wade* v. *Mayo*, 334 U.S. 672, 680, "writs of certiorari are matters of grace." We respectfully ask,—does this mean that it is a favor? One that may be withheld, even where our petition might be sufficient? If so, a lawyer would have a difficult time in

convincing any District Judge that such was the reasonable legal ground in the absence of any notation by Your Honors. Mr. Justice Frankfurter said, dissenting in *Darr* v. *Burford*, 339 U.S. 200, 220, "In any event, to leave the District Courts in the dark as to what a denial of certiorari means in habeas corpus is not consistent with the fair administration of justice." Mr. Justice Reed, in *Darr*, made reference, p. 215, to *Burke* v. *Georgia*, 338 U.S. 941, where Your Honors denied certiorari, "without prejudice to petitioner to seek in the appropriate United States District Court in Georgia whatever relief, if any, may be required by *Mooney* v. *Holohan*, 294 U.S. 103." Also see that said by Judge Goodrich in *United States* v. *Baldi*, 192 F. 2nd 540, 543, concerning the plight of inferior federal courts. The order of the Arizona Supreme Court was directed to the trial court ordering Judge Thomas to dismiss our petition for habeas corpus. Could it be that Your Honors deemed this to be not a final order? If so, Your Honors may never have reached our main question. If it happens that our petition for certiorari was denied for any such reason, may we respectfully request something further than the naked order. In the event of the denial of this petition for rehearing, in the absence of any further announcement, Gusick intends to litigate further, first in the lower federal courts. In order to make certain that he has exhausted all state remedies we shall advise him to see that a final order is entered by Judge Thomas, appeal from that to the Arizona Supreme Court and in the event of affirmance apply here in this Honorable Court again for certiorari.

That said by Mr. Justice Murphy in *Wade* v. *Mayo*, 334 U.S. 672, caused us to believe that Your Honors would not require us to go back to the trial court on an errand doomed to be futile. Judge Thomas would be compelled to obey the mandate and dismiss our petition for habeas corpus.

The Supreme Court of Arizona has spoken and it appears that the law of the case would be applied upon any future appeal from the dismissal order. As was said by Mr. Justice Murphy in *Mayo*, p. 680:

> "But the reasons for this exhaustion principle cease after the highest state court has rendered a decision on the merits of the federal constitutional claim. The state procedure has then ended and there is no longer any danger of a collision between federal and state authority. The problem shifts from the consummation of state remedies to the nature and extent of the federal review of the constitutional issue."

We pray for such order as to Your Honors may seem proper. We trust that upon reconsideration, Your Honors will say, as did Mr. Justice Douglas in *Williams* v. *Kaiser*, 323 U.S. 471:

> "But on the present state of the record before us we do not see what more petitioner need do to establish the federal right on which his petition is based."[5]

Respectfully submitted,

FRANCIS J. BROWN,

WM. SCOTT STEWART,

Attorneys for Petitioner.

---

[5] Mr. Justice Frankfurter, dissenting in *Williams* v. *Kaiser*, p. 48, noted that another petition for a writ of habeas corpus would quickly reveal a point missing in that case. If we are to prepare another petition anything to be said by Your Honors would be helpful not only to us but to other judges and, we respectfully submit, the cause of justice.

CERTIFICATE OF COUNSEL

Wm. Scott Stewart, counsel for petitioner, hereby certifies that the above petition for rehearing is presented promptly in good faith and not for delay. Petitioner is in the penitentiary with nothing to gain by delay.

Counsel has no knowledge of any intervening circumstances but does certify that this petition is presented under Paragraph 2 of Rule 58 and is restricted to substantial grounds not previously presented. The point we seek to make might be inferred or gathered from our petition for certiorari but as we failed to cite *Smith,* it may be now said that this petition for rehearing is based upon grounds not heretofore adequately presented.

WM. SCOTT STEWART,
Counsel for Petitioner.